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Usury -- Affirmative Relief for the Debtor

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statement concerning plaintiff's ability to pass good title should have been evidence of malice sufficient to take the case to the jury.[10]

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Usury—Affirmative Relief for the Debtor.

In spite of the anomalous situation which results from such a decision, and the questionable policy motivating it, the Supreme Court of North Carolina seems determined to follow its line of cases which deny the debtor party to a usurious contract affirmative relief of an equitable nature.[1] In two cases decided this year,[2] the creditor has brought action to foreclose a deed of trust. The debtor has set up usury in his answer, and prayed for injunctive relief. In both cases, defendant's prayer has been denied on the tenuous and abstract ground that he has asked equity and must therefore do equity—in other words, pay the principal plus legal interest.[3] Had the debtor restricted himself to purely legal defenses and remedies, he would have been required to pay no interest, and could have recovered back double the amount of any interest already paid.[4] Or, had he accompanied his prayer for an injunction with a tender of principal and legal interest, presumably he could have had the injunction, and saved his property from sale on foreclosure.[5] But, having chosen neither of these alternatives, he was not only denied the equitable relief which he asked, but, for the mere asking, was penalized

[10] It will be noticed that malice in this connection is not used "in the sense of actual ill-will to the plaintiff, but in the sense of an act done to the apparent damage of another without legal excuse." Morgan v. Smith, 77 N. C. 37 (1877) (action for enticing away servants). This view finds support in other jurisdictions. Employing Printers Club v. Dr. Blosser Co., 122 Ga. 509, 50 S. E. 353 (1905); Quinlivian v. Brown Oil Co., 96 Mont. 147, 29 Pac. (2d) 374 (1934); Lamb v. S. Cheney & Son, 227 N. Y. 418, 125 N. E. 817 (1920).

[1] For a discussion of this situation, see Comment (1934) 12 N. C. L. REV. 279. See also Waters v. Garris, 188 N. C. 305, 124 S. E. 334 (1924).

[2] Thomason v. Swenson, 207 N. C. 519, 177 S. E. 647 (1935); and C. D. Kenny Co. v. Hinton Hotel Co., 208 N. C. 295, 180 S. E. 697 (1935). In the latter case, receivers had been appointed for the debtor. The petition for foreclosure was filed in the receivership proceeding. The other creditors and the receivers answered, praying for the injunction (among other things). The sale was ordered and confirmed, and the lower court decreed that the petitioner was entitled to principal plus six per cent interest. The receivers' appeal was dismissed on other grounds, while the decree was affirmed on the creditors' appeal. The Court treats the case as if only the debtor were the defendant.

The still more recent case of Ghormley v. Hyatt, 208 N. C. 478 (1935) incidentally reaffirms the rule, at p. 482.

[3] Yet note the Court's language in C. D. Kenny Co. v. Hinton Hotel Co., 208 N. C. 295, 298, 180 S. E. 697, 698 (1935): "If this was an action in which [petitioner creditor] . . . was seeking to recover of the defendant [debtor] . . . the amount due on his bond, . . . he would be liable for the statutory penalties for usury."

[4] N. C. CODE (1935) §2306, and annotations thereto. Also note 3 *supra*.

[5] Jonas v. Home Mortgage Co., 205 N. C. 89, 170 S. E. 127 (1933) *semble*.

to the extent of entitling the creditor to principal and legal interest out of the proceeds of the foreclosure sale. It would seem that, if "equity" is to govern, he should have either the relief which he asks or the benefit of the usury statute. There can be no equity in denying him both simply because he seeks equity.

Such a decision virtually repeals the usury statute in certain cases, and creates a troublesome and unnecessary inconsistency in the North Carolina law, as pointed out in an earlier issue of this publication.[6] The inconsistency is further illustrated by the established rule in this state that, when a junior incumbrancer goes into equity to require assignment to him of a usurious senior incumbrance, he is forced to pay only the principal, without interest.[7] Thus the debtor, for whose benefit the usury statute was intended, must "do equity" and pay legal interest if he asks for equity; but a stranger to the usurious contract can have the full benefit of the statute—in equity.[8]

If the Court were convinced of the advisability of overruling those cases which require the debtor who seeks equity to pay legal interest—a rule which was born under quite different conditions[9]—there would seem to be no obstacle in its way. The doctrine of *stare decisis* should not be permitted to impede wholesome judicial reform in the law.[10] There are no vested rights in judicial decisions,[11] and certainly usurious creditors have no vested right to be free from that particular type of relief to their debtors.

However, if the Court feels bound by its earlier decisions, there should be no hesitation by the legislature to so amend the statute as to give debtors the full protection which the policy behind usury statutes dictates.[12]

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[6] Comment (1934) 12 N. C. L. REV. 279, *supra* note 1
See a criticism of the rule in Annotation III A to N. C. CODE (1935) §2306.
Contrast the results of the rule with the following typical language of the Court: "The charging and accepting of illegal interest has always been looked upon by the courts with disfavor. Usury is a source of untold wrong and oppression" [Ghormley v. Hyatt, 208 N. C. 478, 484 (1935)].

[7] Sherrill v. Hood, 208 N. C. 472 (1935).

[8] *Cf.* C. D. Kenny Co. v. Hinton Hotel Co., 208 N. C. 295, 180 S. E. 697 (1935), *supra* note 2.

[9] See Comment (1934) 12 N. C. L. REV. 279, 280.

[10] Von Moschzisker, Stare Decisis *in Courts of Last Resort* (1924) 37 HARV. L. REV. 409; Sims, *The Problem of* Stare Decisis *in the Reform of the Law* (1930) 36 PA. B. A. REP. 170.

[11] See Iowa v. O'Neil, 147 Iowa 513, 516, 126 N. W. 454, 455 (1910).

[12] See the suggested amendment, Comment (1934) 12 N. C. L. REV. 279, 281.